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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 535

UNITED STATES OF AMERICA,

Petitioner,

vs.

THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL.,

Respondents.

BRIEF AND ARGUMENT ON BEHALF OF RESPONDENTS

F. W. ROOT,
A. C. ERDALL,
Attorneys for Respondents,
25 Milwaukee Station,
Minneapolis, Minnesota.

Of Counsel:
A. N. WHITLOCK,
C. S. JEFFERSON,
Chicago, Ill.,
C. O. NEWCOMB,
Minneapolis, Minn.,
On brief for respondents.

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IN THE

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OCTOBER TERM, 1940

No. 535

UNITED STATES OF AMERICA,

Petitioner,

vs.

THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL.,

Respondents.

BRIEF AND ARGUMENT ON BEHALF OF RESPONDENTS

The jurisdiction of this Court is invoked to review two final judgments of the United States District Court for the District of Minnesota, First Division, one in the amount of $7,247.21 (R. 87) for flowage easements in property of respondents taken by petitioner in Wabasha County, Minnesota, and the other in the amount of $60,357.67 (R. 82) for similar easements in respondents' property in Winona County (R. 82), together with interest thereon from December 9, 1934 (R. 83 and 87).

The official report of opinion in the Court below (R. 188-198) is reported in 113 F. (2d) 919. The District Court did not write an opinion.

Italics throughout brief are ours.

QUESTIONS PRESENTED

The Trial Court denied the Government's offer to prove the railroad and telegraph lines were constructed between low and ordinary high water elevations of the Mississippi River (R. 146-147).

The Trial Court, at the close of the testimony, denied the motion of the Government to dismiss from the condemnation proceedings the four segments of land here involved (R. 152-155).

The statement of the "Question Presented" in petitioner's brief refers to only one of the questions presented and as to that one, it is clearly insufficient and may be misleading to the Court.

The Circuit Court of Appeals, in its opinion, very clearly sets out the one important question determined by it and which is now before this Court for determination (R. 193).

Are respondents entitled to compensation for measures necessarily taken by them to protect their property against the new water levels created by the petitioner in the construction and operation of Dam No. 5, where it appears all of such protective measures were required and taken solely to protect such property against water levels in excess of ordinary high water elevation (R. 146) where it appears respondents' property does not at present obstruct, interfere with or affect navigation and will not do so after the proposed improvement of navigation and where it further appears two sections of said property are one-quarter to one-half mile distant from the channel of the river with a large area of land higher than ordinary high water elevation intervening (Rd. Ex. 1, R. 95, 179, Appendix VI of this brief), and, where it further appears respondents' said two sections of property are located on a tributary (Walters

Creek) of the river and where it further appears, by stipulation, petitioner was permitted to prove the fact as to whether Walters Creek was or was not a navigable waterway of the United States (R. 145), but failed to offer any proof that same was such navigable waterway and where it further appears respondents were not permitted to have the bill of exceptions include a complete record on this appeal (R. 170, 176).

Was the offer to prove respondents' structures were constructed on land between low and ordinary high water elevations restricted to the conditions existing when the railroad was double-tracked in 1910, or, did it also include conditions existing in 1934 at the time when petitioner, by order of Court, took immediate possession of the flowage easement in said property?

Was the motion to dismiss from this proceeding the four segments of property here involved timely? (R. 152-155.)

STATEMENT

The statement contained in the petitioner's brief fails to include many facts essential to a proper understanding and determination of the questions before the Court. We will call attention to some of these important omitted facts.

The railroad has existed along the river since about 1870. It is now a double-track railroad and is the main line between Chicago, Milwaukee, St. Paul, Minneapolis and the Pacific Northwest. It is a busy stretch of railroad (R. 115), there being a large number of freight, passenger and mail trains operated thereover (R. 99). The telegraph and telephone lines are important main trunk lines of the Railroad and Telegraph Companies (R. 115).

The 26 dams constructed across the river and bottom lands

in the Upper Mississippi River permit slack-water navigation. That means the Mississippi River, instead of flowing as a stream, is flowing through a series of lakes (R. 113). Lock and Dam No. 5, near Minneiska, raises the natural water levels in the segments of the railroad here involved from 12 to 15 feet above low water elevation (R. 109, Rd. Ex. 2) and 5.6 to 7.5 feet above ordinary high water elevation (R. 140, 132).

Cross-Section and Plan in Petitioner's Brief (Appendix B) Is Not Illustrative of Areas Involved.

The cross-section sketch appearing on page 27 of the petitioner's brief not only is not typical but does not remotely indicate the true situation at any of the claimed encroachment areas in either Winona or Wabasha Counties (Rd. Ex. 1, R. 97, 179, Appendix VI). Therefore, respondents have reproduced herein as Appendix I, II, III and IV an illustrative cross-section in each of the four claimed encroachment areas, each of which was reproduced in the briefs in the Circuit Court of Appeals. Appendix VI is a portion of Railroad Exhibit 1 showing in black and white the three claimed encroachment areas in Winona County. Railroad Exhibit 1, on a reduced scale (R. 179), shows in blue, land which is flooded by the pool at elevation 660 (R. 97). A detailed explanation of this map appears in the record (R. 97-99).

Claimed encroachment areas III and II in Winona County are adjacent to Walters Creek. The end of Wing Dam 33, opposite area III and of Wing Dams 35, 36 and 37, opposite area II, are from 1,300 to 2,750 feet distant from the tracks. The navigable channel commences at the more distant end of these wing dams (Rd. Ex. 1, R. 179, Appendix VI). Land be-

tween wing dams and railroad is covered with "Brush and Timber" (Rd. Ex. 1, R. 179, Appendix VI). Spot elevations show land above ordinary high water elevation distant from the railroad tracks as much as 1,250 feet in area III and as much as 600 to 1,700 feet in area II. Spot elevations above low water are shown still farther away from the railroad (Rd. Ex. 1, R. 179, Appendix II, III and VI). In claimed encroachment area I, the near end of Wing Dam 108 is about 100 feet and the river end about 225 feet from the track. Scaling indicates upland extends out from the track for a distance of 50 to 110 feet throughout this claimed encroachment area. Wing Dam 107, near the western edge of this claimed encroachment area, extends about 450 feet out from the track (Appendix VI). The purpose of the wing dams, as testified to by the various witnesses, was to keep the channel away from the shore (R. 96) and to keep a deep channel (R. 110, 113). Anything that will restrict the channel between the ends of the wing dams would be helpful to navigation (R. 113).

During the trial, the parties entered into stipulation which, among other things, provided that said stipulation "shall not deprive either of the parties herein from herein proving or disproving the waterway along the claimed encroachments are or are not in fact navigable waterways of the United States" (R. 145). The Government, in its petition and in accordance with the order for immediate possession on August 4, 1934, took respondents' property in Winona and Wabasha Counties (R. 23-31) including the claimed encroachment areas, but did not submit any proof to show whether or not Walters Creek adjacent to areas II and III was or was not a navigable waterway of the United States. The Government did not claim that any structure of respondents' here involved obstructed navigation in the river (R.

137). The Government did not offer to prove any part of the railroad was below ordinary high water mark when the condemnation proceedings were commenced or when immediate possession of the respondents' property was granted. The rejected offer to prove related to a condition claimed to exist in 1909 or 1910 (R. 146, 151).

Undisputed Facts.

1. The District Engineer of the respondent Railroad in December, 1909, wrote to Major Riche, United States District Engineer in charge of this portion of the Mississippi River, stating the Railroad intended to double-track and to make certain changes in its alignment at points shown in red on the map (U. S. Ex. 70, R. 149) and also requesting permission to proceed with the work (R. 147-149). On Exhibit 70, the vertical figure 4800 is a railroad station in the claimed encroachment area in Wabasha County. Railroad Station 4930 was in claimed encroachment area III in Winona County and Railroad Stations 4950 and 4960 were in claimed encroachment area II in said county. That exhibit made on November 9, 1909, shows areas II and III were in "Low marshy land." Stations 4980 and 4990 are in claimed encroachment area I (R. 149). Major Riche, in answer, advised that in the proposed new line he found nothing "prejudicial to the interests of navigation or in any way interfering with the proposed Government improvement of the river" (R. 151).

2. The railroad was made into a double-track railroad and the alignment changed in 1910 (R. 142).

3. The four claimed encroachment areas are shown in the stipulation of the parties (R. 121 and 125) and the three located in Winona County are shown on a larger scale in

the portion of Railroad Exhibit 1 hereto attached as Appendix VI. The condemnation proceedings included the claimed encroachment areas (R. 6, 9, 13, 15, 16, 17).

4. The testimony was undisputed that the Railroad and Telegraph Companies' embankments, tracks, culverts, bridges, poles and other facilities within the limits of this appeal were in good condition and adequately protected to withstand water and ice action under natural conditions of the Mississippi River and its tributaries (R. 116).

5. Respondents have not stipulated or conceded that any portion of their property in Winona County was located on land below ordinary high water elevation of the river when the railroad was double-tracked, the proceedings herein were commenced or possession of their property taken by the Government (R. 118-120). Such a concession was made in Wabasha County (R. 123).

6. In the summarized statement it is conceded "competent and sufficient evidence was introduced by the Railroad Company and the Government to support and sustain the verdict as to the need for protecting the property of the Railroad and Telegraph Companies under the new changed conditions and to sustain the verdict as to the amount thereof as to each item of damage claimed by and allowed to the Railroad and Telegraph Companies by the jury" (R. 118).

7. The summarized statement concedes "the character, amount and necessity for the measures taken to protect the Railroad and Telegraph Companies from the waters raised and impounded by Lock and Dam No. 5 and the reasonable cost of such protective measures is not at issue on this appeal by reason of the stipulation of the parties. * * * For that reason, the voluminous testimony showing the ac-

tual protective measures taken and the cost thereof has been omitted in this Bill of Exceptions" (R. 118).

8. The petitioner conceded the structures of the Railroad and Telegraph Companies in each of the claimed encroachment areas were located on land which was at an elevation above the low water (R. 144) but offered to prove the structures were constructed between low and ordinary high water mark elevations of the river (R. 143, 146).

9. It was conceded by the Government's attorneys that the 660 pool will raise the river water level six or eight feet above the elevation claimed by the Government to be the ordinary high water mark of the river (R. 132-133). The proof showed it would be 5.6 feet to 7.5 feet in the claimed encroachment areas (R. 140).

10. The Government conceded no damage would occur to the Railroad and Telegraph Companies unless the Government artificially raised the water level of the Mississippi River to a point higher than ordinary high water mark (R. 132-133, 142-143), and "that all of the damages sustained by the Railroad and Telegraph Companies are caused by the waters of the Mississippi River being raised to a level higher than ordinary high water mark" (R. 146).

11. "The Railroad Company is the riparian owner in the segments involved in this appeal" (R. 145).

12. It was conceded by counsel for the Government that the construction of the railroad between low water mark and ordinary high water mark did not actually interfere with navigation but it was claimed same became a financial obstruction if the Government had to pay compensation for the cost of protecting same against waters raised by the Government's lock and dam (R. 135-137).

13. The record shows that all lands shown in blue on Railroad Exhibit 1 (R. 179) were covered with timber. The trees ranged from 48 inches in diameter down to brush (R. 98).

14. Immediate possession of the easement in respondents' property including the portion in the four claimed encroachment areas was taken by the Government on August 4, 1934 (R. 25-31, 6, 13).

Certain Misleading and Incomplete Statements in Petitioner's Brief Should Be Clarified.

On pages 3 and 4 of petitioner's brief, it is stated in substance that by reason of the removal "of the timber and underbrush in the margins of the river and in the area to be flooded" the railroad "embankment was thereby exposed to greater wind, wave and ice action, which made it necessary for the defendants to riprap and otherwise protect their embankment" (R. 116). This is only a part of the picture. In the agreed summarized statement of facts, it is stated:

> "The testimony was undisputed. The Railroad and Telegraph embankments, tracks, culverts, bridges, poles and other facilities within the limits of this appeal were in good condition and adequately protected to withstand river and ice action under natural conditions of the Mississippi River and its tributaries.
>
> "The testimony of each of said witnesses was that as to the portions of the Railroad and Telegraph properties included in this appeal, certain protective measures had to be taken in order that such properties could continue to be operated in the same safe and efficient manner *after the raising of the water to pool level* as they were operated under natural conditions of the Mississippi River. * * *

"All of the witnesses testified that the impounding of the river water upstream from Dam No. 5 to the normal pool level would cause water, and, in the winter, ice, to strike the railroad embankments at a much higher elevation than under natural ordinary stages and flows of the Mississippi River. That the railroad embankments because thereof would be saturated at least up to the pool level and needed riprap (rock) protection to stabilize the embankments so as to safely carry the heavy engines and trains operating on the railroad. That riprap was required to protect the railroad embankments from wave action on the new pool level and also to protect such embankments from ice movement on the pool caused by expansion and contraction in the winter and from movement of ice floes on the spring breakup caused by wind and current.

"They all testified that embankment protection (rock riprap) was required upon the railroad embankments at the locations where it was in fact placed and proposed by the Railroad in the areas covered by this appeal. The only dispute concerned the quantity of and elevation to which such riprap should be carried above normal pool elevation."

On page 4 of the brief, it is stated the Railroad, in double-tracking its railroad placed "portions of their embankment across the bends in the Mississippi * * *." This is both misleading and incorrect. In claimed encroachment areas II and III, the river bends away from the railroad and is located from 1,300 feet to 2,700 feet distant from the railroad tracks. A comparison of this actual situation with the cross-section shown on page 27 of the petitioner's brief clearly shows that both the statement and cross-section give an improper picture of the true situation (U. S. Ex. 70, R. 149, Ex. "A," R. 125, 121, Rd. Ex. 1, R. 97, 179, and Appendix VI).

On page 5 of the petitioner's brief, it is stated the Appellate Court held the additional flooding of respondents' property was a compensable taking even though the damaged structures were located in the bed of the stream (R. 188-198). Concededly, all of respondents' structures were located on ground with an elevation above low water mark (R. 146, 67). It should be kept in mind the Circuit Court of Appeals, in using the language similar to that just referred to, was referring to the bed of the stream as including all of the portions of the low lands which were below ordinary high water mark elevation, even though such low lands with timber, grass, brush and willows growing thereon, extended for hundreds and, in some instances, thousands of feet on each side of the main stream of the Mississippi River (Appendix VI).

ARGUMENT

The Offer of Proof.

The Government offered to prove that three segments of respondents' property in Winona County and one segment in Wabasha County, each segment at times being referred to as an encroachment area, "are constructed on land which is located below ordinary high water mark and above low water mark. * * * The Government concedes the embankments were constructed above low water mark" (R. 146, 67).

Respondents objected to the offer of proof upon the ground, among others, "that the fact which the Government proposes to prove is immaterial" (R. 147) and that the waterway adjacent to claimed encroachment areas II and III (Walters Creek) is not a navigable waterway of the United States (R. 147). The Court sustained the objection to the offer of proof (R. 147, 67).

The exhibits under discussion in connection with said offer of proof related to conditions existing in 1909 prior to the double-tracking in 1910 (see Gov. Exs. 69, 70, 71, R. 147-151) (Rd. Ex. 2, Gov. Ex. 9, as to location of original ground line prior to 1910, R. 102, 141).

As to the segment of land in Wabasha County, after the trial, by stipulation, respondents conceded their railroad embankment not only in 1910 but also when the petition for condemnation was filed in 1933 was located on land between low and ordinary high water elevations of the river (R. 123, 14).

However, the Circuit Court of Appeals, in its opinion, stated:

> "For the purposes of this opinion, we shall assume that the 'encroachment areas' are all upon lands lying below ordinary high water mark and above low water mark" (R. 191).

The three claimed encroachment areas in Winona County are indicated on the portion of Railroad Exhibit 1 attached hereto as Appendix VI. The waterway immediately adjacent to and riverward from the so-called encroachment areas II and III, designated "Walters Creek," it is asserted by respondents, was not a navigable waterway of the United States, and the offer of proof was objected to on that ground (R. 147). In the stipulation of the parties made at the time of the Government's offer of proof, it was agreed that the stipulation should not deprive either of the parties from proving or disproving the waterways along the claimed encroachments are or are not in fact navigable waterways of the United States (R. 145). Most of respondents' evidence showing this fact was excluded from the record on appeal to the Circuit Court of Appeals by the United States District

Judge who passed upon the record after the death of the Trial Judge (His Honor, Judge Molyneaux) upon the ground such record was immaterial on this appeal.

The River Shore Line of 1910 Not Necessarily the Same in 1934.

Even if it be a fact that the Railroad constructed its new alignment in 1910 between low and ordinary high water elevations, such fact is no evidence that in 1934, when immediate possession was taken by the Government, the shore line of the Mississippi River had continued to be the same.[1]

In fact constant changes are taking place in the Mississippi River shore lines.[2]

The Offer of Proof Was Immaterial.

Many cogent reasons exist for sustaining the holding of the Trial Court that the offer of proof was immaterial (R. 145-147). The same reasons indicate the respondents are entitled to receive compensation from the Government for the flowage easements taken in the property here involved, even though it be assumed (contrary to the fact in Winona County) the railroad, when immediate possession of same was taken by the Government, was located between low and ordinary high water elevations.

1. Waterways adjacent to encroachment areas.

(a) The waterway (Mississippi River) adjacent to claimed encroachment area No. I in Winona County and

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[1]Brooks vs. United States (C. C. A. 8), 146 Fed. 223, 229.
C., St. P., M. & O. R. Co. vs. Rorig (C. C. A. 8), 217 Fed. 953.

[2]Harrison, et al., vs. Fite (C. C. A. 8), 148 Fed. 781, 785.

adjacent to the claimed encroachment area in Wabasha County is a navigable waterway of the United States (Rd. Ex. 1, R. 179, Appendix I, IV and V);

(b) Walters Creek was not a navigable waterway of the United States.

While the Court excluded photographs and cross-sections and other exhibits which graphically showed Walters Creek was not a navigable waterway of the United States upon the ground such proof was immaterial on this appeal (R. 170, 175), nevertheless, there still remains in the record considerable proof which indicates rather clearly that the waterway (Walters Creek) adjacent to claimed encroachment areas II and III "is not a navigable waterway of the United States" (Rd. Ex. 1, R. 97, 179, Appendix II, III and VI).

At the trial, the Government was by stipulation permitted to offer any proof it might have that Walters Creek was a navigable waterway of the United States (R. 145). Respondents' objection to the Government's offer of proof (Assignment of Error 12) asserted, as one of its grounds, the waterway along claimed encroachment areas II and III was "not a navigable waterway of the United States" and "not a waterway in which there is any practical possibility of its being used as a highway for interstate or foreign commerce" (R. 147).

As stated by this Court in the recent case of *United States vs. Appalachian Electric Power Co.* (Dec. 16, 1940), ... U. S. ...., 61 S. Ct. 290:

> "A waterway *otherwise suitable for navigation* is not barred from that classification merely because artificial aids must make the highway *suitable for use before* commercial navigation may be undertaken" (p. 299).

"In determining the navigable character of the New River, it is proper to consider the *feasibility of interstate use after reasonable improvements* which might be made" (p. 300).

As indicated on Railroad Exhibit 1, Walters Creek decreases in size as one goes upstream, passing under the railroad at Bridge L-82 (R. 179). A mere glance at that exhibit shows the creek adjacent to claimed encroachment areas II and III is not now and cannot be made suitable for commercial or interstate navigation and this would be true if the waterway were improved by dredging and the removal of Wing Dam No 101. There are no nearby persons to make shipments and no commodities to be shipped.

The Government did not prove or offer to prove this waterway was a navigable waterway of the United States. It did not prove any past or prospective commerce, or that boats had or could enter or use this waterway, or that any habitation, industry, building or commodity for shipment existed along this waterway (Appendix VI).

Such a waterway is not a navigable waterway of the United States.[3]

2. The title of respondents as riparian owners in segments in question depends on local law.

Respondents are concededly riparian owners in the segments in question (R. 145).

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[3] **Harrison vs. Fite** (C. C. A. 8), 148 Fed. 781, 783, 784.
United States vs. Doughton, et al. (C. C. A. 4), 62 F. (2d) 936, 938.
State of Oklahoma vs. State of Texas, 258 U. S. 574, 591.
United States vs. Appalachian Elec. Pwr. Co., ...U. S....., 61 S. Ct. 290.
Davis, et al., vs. Gulf & I. Ry. Co., et al. (C. C. A. 5), 31 F. (2d) 109.

"The question of the title of riparian owner is one of local law."[4]

3. In Minnesota, the riparian owner holds the fee to low water mark on a navigable waterway.[5]

He also holds the *"jus privatum"* in the bed subject only to the *"jus publicum"* in the State,[6] and has certain riparian rights out to the navigable channel which cannot be taken even by the State without just compensation.[7] He has the right if public interests are not prejudiced thereby to reclaim submerged lands and ~~it is to~~ the interests of the State

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[4] Whitaker vs. McBride, 197 U. S. 510, 516.
Hamlin vs. Jordan, 140 U. S. 371.
Brewer-Elliott Oil & G. Co. vs. U. S. (1922), 260 U. S. 77.
Fox River Paper Co. vs. Rd. Com. of Wis., 274 U. S. 651.
Lamprey, et al., vs. State of Minn., 52 Minn. 181, 192.
Morrill vs. S. A. F. W. P. Co., 26 Minn. 222, 226, 228.

[5] Lake Superior Land Co. vs. Emerson (1888), 38 Minn. 406.
Hanford vs. St. P. & D. Rd. Co. (1890), 43 Minn. 104, 111.
Miller vs. Mendenhall (1890), 43 Minn. 95.

[6] State vs. Korrer (1914), 127 Minn. 60.
Bradshaw vs. Duluth Imperial Mill Co. (1892), 52 Minn. 59.
Hanford vs. St. P. & Dul. Rd. Co., supra.
Hobart vs. Hall, 174 Fed. 433.
Hall vs. Hobart (C. C. A. 8), 186 Fed. 426.
Pike Rapids Pwr. Co. vs. M., St. P. & S. S. M. Ry. Co. (C. C. A. 8), 99 F. (2d) 902, 912.

[7] Union Depot Co. vs. Brunswick, 31 Minn. 297, 301.
Carli vs. Stillwater St. Ry., 28 Minn. 373.
Miller vs. Mendenhall, 43 Minn. 95.
Lamprey, et al., vs. State of Minn., 52 Minn. 181, 192.
Lake Superior Land Co. vs. Emerson, 38 Minn. 406.
State vs. Korrer, 127 Minn. 60.
Hanford vs. St. P. & D. Rd. Co., supra, at p. 118.
Yates vs. City of Milwaukee, 77 U. S. 497, 507.
Monongahela Navigation Co. vs. United States, 148 U. S. 312.
United States vs. Great Falls Mfg. Co., 112 U. S. 645.
Dutton vs. Strong & Goodnow, 1 Black 23.
Pike Rapids Pwr. Co. vs. M., St. P. & S. S. M. Ry. Co., supra, page 912.

that such waste lands be reclaimed.[8] A presumption exists that he did not reclaim beyond the point of navigability. See *Union Depot Co. vs. Brunswick, supra,* at page 303. As therein stated, "the usual and often the only practical way on the Mississippi and its tributaries (is) by reclaiming the land by artificial filling in with earth out to the requisite depth of water."

4. "The servitude of private lands to navigation is confined to the natural widths, levels and flows of the river." If more is taken, the Government must compensate the owner for such taking.

All of the compensation awarded to the respondents herein was awarded to compensate them for damages caused by the artificial changing and raising of the levels of the Mississippi River and its tributaries permanently. All of the damages herein involved concededly are caused solely by the natural levels of the river being raised by Lock and Dam No. 5 above ordinary high water mark (R. 146, 132, 133, 142-143).

The water levels are raised by the dam in each of the four claimed encroachment areas 15.3 feet, 14.8 feet, 14 feet, and 12 feet above low water (Rd. Ex. 2 and Appendix I, II, III, IV) and 7.5 feet, 7.1 feet, 6.9 feet and 5.6 feet respectively above ordinary high water elevation (R. 140, Rd. Ex. 2 and Appendix I, II, III and IV).

In *United States vs. C., B. & Q. Rd. Co.* (C. C. A. 8), 82 F. (2d). 131 (Writ of Certiorari denied, *U. S. vs. C., B. & Q. Rd. Co.,* 298 U. S. 689), at page 134, it is said:

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[8] Hanford vs. St. P. & Dul. Rd. Co., supra, page 118;
Union Depot Co. vs. Brunswick, supra.
Bradshaw vs. Duluth Imperial Mill Co., 52 Minn. 59.

> "As a foreword, it may be premised that, if well-nigh the unanimous voice of *stare decisis* shall be heeded, appellee had the right to build its railroad along the bank of the Mississippi, even though a navigable stream, and that in so doing it had the legal right to rely upon the continued maintenance of the natural level, width and flow thereof. And that the right to increase artificially this level, width and flow (to the hurt of the appellee) beyond that provided by nature, could be obtained by appellant only by the exercise of the sovereign right of eminent domain, and the payment to appellee of just compensation for the damages by it sustained."

A leading case is *United States vs. Cress, United States vs. Kelly,* 243 U. S. 316. In those cases, certain locks and dams backed up water into White Oak and Miller Creeks. The Trial Court failed to find whether White Oak Creek was or was not navigable. This Court, in said cases, discusses the rights of States and the authority of Congress as to navigable streams. On page 319, this Court said:

> "The States have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders both navigable and non-navigable, and the ownership of the lands forming their beds and banks * * * *subject, however, in the case of navigable streams, to the paramount authority of Congress to control the navigation so far as may be necessary for the regulation of commerce among the States and with foreign nations,* * * * *the exercise of this authority being subject, in its turn, to the inhibition of the Fifth Amendment against the taking of private property for public use without just compensation. (Monongahela Navigation Co. vs. U. S.,* 148 U. S. 312, 336; *U. S. vs. Lynah,* 188 U. S. 445, 465, 471.)"

On page 321, the Court says:

"* * * *riparian owners have a right to the enjoyment of the natural flow without burden of hindrance imposed by artificial means, and no public easement beyond the natural one can arise without grant or dedication save by condemnation with appropriate compensation for the private right* (citing cases in note)."

On page 326, the Court further said:

"But the authority to make such improvements (raising WATER LEVELS BY dams, etc.) is only a branch of the power to regulate interstate and foreign commerce, and, as already stated, this power like others, *must be exercised, when private property is taken, in subordination to the Fifth Amendment. Monongahela Navigation Co. vs. United States,* 148 U. S. 312, 336; *United States vs. Lynah,* 188 U. S. 445, 465, 471. And we deem it clear that so much of the properties of the respective defendants in error as was unaffected by the flow of the rivers or their tributaries prior to the construction of the locks and dams in question was private property, and not subject to be overflowed, without compensation, in the raising of the level of the rivers by means of artificial dams."

The Railroad and Telegraph Companies, in building their railroad and telegraph lines *"had a right to rely upon the history of the height to which the water had risen at various flood periods and its natural height in determining the elevation to which it was to be constructed."* If the elevation of the water is raised beyond its natural stage by artificial means and a flowage easement established, as in the instant case, it would seem that the owner of the land affected must be justly compensated for the damages thus sustained."

See *United States vs. Wabasha-Nelson Bridge Co.* (C. C. A. 7), 83 F. (2d) 852, 854.

The public easement of navigation on the river fluctuates, ordinarily being low in the winter and summer, higher in the fall and highest in the spring. The Government has no right to continuously maintain the water levels at the spring or fall levels. When the flow of the water in the river provided by nature is at a low level, the servitude of public navigation must necessarily be at the same low level.

In the instant case, the Government has taken from respondents the right to maintain their railroad and telephone and telegraph lines at the natural levels of the river. They had and exercised this right prior to the commencement of the condemnation proceedings here involved.

See *United United vs. Wheeler Township* (C. C. A. 8), 66 F. (2d) 977, 984.

We submit the foregoing decisions demonstrate in the instant case: (1) that the public easement of navigation is limited to the natural widths, levels and flows of the river, (2) that the respondents are entitled to the continuous maintenance of the levels, widths and flows provided by nature in Walters Creek and in the Mississippi River, and (3) that all property of the respondents which was adequately protected against and, therefore, not affected by the natural levels, widths and flows of Walters Creek and the Mississippi River was private property and to the extent that such property is affected by the alteration in the natural flows and the raising of the natural levels by Dam No. 5, compensation must be made to respondents. See also cases cited below.[9]

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[9]See **Kincaid vs. United States** (D. Ct., W. D., La., N. D.), 37 F. (2d) 602, 607.

Jacobs vs. United States (C. C. A. 5), 45 F. (2d) 34, 37 (1930).

Jacobs vs. United States, 290 U. S. 13, 54 S. Ct. 26.

United States vs. C., B. & Q. Rd. Co. (C. C. A. 7), 90 F. (2d) 161, 170.

5. This Court has definitely held where property of a riparian owner is located between low and ordinary high water elevations of a navigable river and same does not obstruct or interfere with navigation on the river, the owner of such property may recover compensation from the Government for a partial taking of such property caused by raising the water levels above natural levels.

So far as here material, the Fifth Amendment to the United States Constitution provides:

> "No person shall be * * * deprived of * * * property without due process of law; nor shall private property be taken for public use without just compensation."

In *United States vs. Lynah*, 188 U. S. 445, the principal

United States vs. Lynah, 188 U. S. 445.
Yates vs. City of Milwaukee, supra.
Pumpelly vs. C., B. & M. Co., 13 Wall. 166.
Eaton vs. Boston Ry. (1872), 51 N. H. 505.
United States vs. Great Falls Mfg. Co., 112 U. S. 645.
Kaukauna Wtr. Pwr. Co. vs. Green Bay & M. Canal Co. (1891), 142 U. S. 254.
Monongahela Navigation Co. vs. United States, supra.
Paine Lbr. Co. vs. U. S. (1893), 55 Fed. 854.
King vs. United States (C. C., D. S. C.) (1893), 59 Fed. 9—Appeals dismissed, 164 U. S. 703.
Williams vs. U. S. (1900), 104 Fed. 50—Affirmed in United States vs. Williams, 188 U. S. 485.
Thompkins vs. United States (1910), 45 Ct. Cls. 64, 66.
Heyward vs. United States (1911), 46 Ct. Cls. 484, 52 Ct. Cls. 87—Affirmed in United States vs. Heyward, 250 U. S. 633.
Peabody vs. United States (1913), 231 U. S. 530, 34 S. Ct. 159.
Richards vs. Washington Terminal Co. (1914), 233 U. S. 546, 34 S. Ct. 654.
Patrick J. Hurley, Secretary of War, vs. Kincaid (1932), 285 U. S. 95—Reversing United States vs. Kincaid (1931), 49 F. (2d) 768.
Pike Rapids Pwr. Co. vs. M., St. P. & S. S. M. Ry. Co., supra, p. 912.
Weaver vs. Mississippi & Rum River Boom Co., 28 Minn. 534, 538.
Carlson vs. St. Louis River Dam & Improvement Co., 73 Minn. 128, 133.

question involved was whether or not the artificial raising of the water levels of a navigable river, so as to destroy Lynah's rice plantation located between low and ordinary high water marks of the Savannah River, constituted a taking of Lynah's property where such water levels were raised in aid of navigation under the commerce clause of the Federal Constitution. On page 468, this Court said:

> "Was there a taking? There was no proceeding in condemnation instituted by the Government, no attempt in terms to take and appropriate title. * * *
>
> "Some question is made as to the meaning of the findings. *It appears* from the 5th finding, as amended, *that a large portion of the land flooded was in its natural condition between high-water mark and low-water mark, and was subject to overflow as the water passed from one stage to the other;* that this natural overflow was stopped by an embankment, and in lieu thereof, by means of flood gates, the land was flooded and drained at the will of the owner. * * * both by seepage and percolation through the embankment, and an actual flowing upon the plantation above the obstruction, the water has been raised in the plantation 18 inches; that it is impossible to remove this overflow of water, and, as a consequence, the property has become an irreclaimable bog, unfit for the purpose of rice culture or any other known agriculture, and deprived of all value. It is clear from these findings that what was a valuable rice plantation has been permanently flooded, wholly destroyed in value, and turned into an irreclaimable bog; and this as the necessary result of the work which the Government has undertaken. Does this amount to a taking?"

On page 474, the Court said:

> "Following the settled law of this Court, we hold that there has been a taking of the lands for public

uses, and that the Government is under an implied contract to make just compensation therefor."

The Lynah case is in accord with earlier decisions and has been followed in a number of decisions.[10]

In *United States vs. Wabasha-Nelson Bridge Co.* (C. C. A. 7), 83 F. (2d) 852, a roadway embankment was located in the bottom lands upstream from Mississippi River Dam No. 4. Portions of same were below ordinary high water mark. Dam No. 4 only raised the water levels from 1 to 2 feet above ordinary high water mark at the point in question, whereas in the instant case, Dam No. 5 in the areas involved raised the water levels from 5.6 to 7.5 feet above ordinary high water elevation (R. 132, 140). Judgment awarding compensation for taking a flowage easement in the road-

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[10] Williams, et al., vs. United States (1900), 104 Fed. 50.
United States vs. Williams, 188 U. S. 485.
King vs. United States, 59 Fed. 9—Appeal from this decision dismissed by United States Supreme Court in United States vs. King, 164 U. S. 703.
Lowndes vs. United States, 105 Fed. 838.
Heyward vs. United States, 46 Ct. Cls. 484.
United States vs. Heyward, 250 U. S. 633.
Illinois Central Rd. Co. vs. St. of Illinois, et al., 146 U. S. 387.
Yates vs. City of Milwaukee, 77 U. S. 497.
Monongahela Navigation Co. vs. United States, 148 U. S. 312.
Dutton vs. Strong & Goodnow, 1 Black 23.
Hanford vs. St. P. & Dul. Rd. Co., 43 Minn. 104, 118.
Jacobs vs. United States, 290 U. S. 13.
Jacobs vs. United States (C. C. A. 5), 45 F. (2d) 34, 37.
United States vs. C., B. & Q. Rd. Co. (C. C. A. 8), 82 F. (2d) 131, 134—Writ of Cert. denied in United States vs. C., B. & Q. Rd. Co., 298 U. S. 689.
United States vs. Wheeler Township (C. C. A. 8), 66 F. (2d) 977.
United States vs. C., B. & Q. Rd. Co. (C. C. A. 7), 90 F. (2d) 161, 170.
United States vs. C., B. & Q. Rd. Co., 302 U. S. 714.
United States vs. Wabasha-Nelson Bridge Co. (C. C. A. 7), 83 F. (2d) 852, 854.
Hurley vs. Kincaid, 285 U. S. 95, 104.

way embankment was affirmed. At page 853, the Court said:

> "It was also determined that an ordinary high water stage would not exceed an elevation of 665 or 666 feet; thus leaving a vertical spread of 10 to 11 feet at the time of an ordinary high water. The natural flow of the water at such times would contact the embankment at this elevation, but would fluctuate and not remain the same at all times. During many months of the year the water level would, of course, be much lower than that elevation. Because of the different elevations of the land adjacent to appellee's right of way, the water, at an elevation of 667 feet, the flowage easement of the government, does not contact the embankment of the roadway throughout its entire length. It will, however, contact it at various places and will tend to cause the water in the borrow pits throughout its entire length to be elevated. At the places where direct contact is had, or where the land of appellee is directly invaded, the water will remain at a level of at least one foot higher upon the embankment than it would if the dam had not been constructed and the flowage easement established. It is clear, therefore, that such easement does encroach upon the property of appellee."

(a) Respondents' Property for Which Compensation Was Herein Granted Did Not Obstruct Navigation.

At low water stages, the entire railroad embankment in each of the four claimed encroachment areas rests upon dry land. Such condition exists for many months each year. There are wing dams riverward from the railroad in each area (Rd. Ex. 1, R. 179, Appendix VI). "The purpose (of these wing dams) is to keep the channel away from the shore" (R. 96). "Anything that would restrict the channel between the ends of the wing dam would be helpful to naviga-

tion" (R. 113). In the encroachment area in Wabasha County, the Government constructed Wing Dam No. 48 and Wing Dam No. 49 (Rd. Ex. 1, R., 97, 179). In Winona County, it has constructed Wing Dam No. 33 in area III, Wing Dams 35, 36 and 37 in area II, and Wing Dams 107 and 108 in area I (Appendix VI). In areas II and III, the nearest edge of the channel of the river varies from 1,300 to 2,100 feet at right angles from the railroad with timber, willows and brush on the intervening land (Appendix VI).

As shown by House Document No. 290, 71st Congress, 2nd Session:

> "These dams (including Dam No. 5) would provide a nine-foot depth in the section of the river canalized."

Counsel for the Government did not claim any of the respondents' structures would obstruct navigation (R. 135, 137). Their sole claim was if required to pay for taking such structures, same would constitute a financial burden (R. 135, 137). The Circuit Court of Appeals found the railroad embankment was not an obstruction to navigation stating the "embankment does not interfere with or obstruct navigation" (R. 193).

The Circuit Court of Appeals, in its opinion, further very aptly said:

> "Since the embankment and structures of the appellees are not claimed to be, and are not, obstructions to navigation, and have not been determined by Congress to be such obstructions, we think that, under the rule announced in the Lynah and Cress cases, the flooding of appellees' property, here involved, above ordinary high water mark was a taking of their property, for which they were entitled to compensation" (R. 197-198).

(b) The Railroad Embankments Are Not in the Bed of the Stream and Are Not in Violation of Sections 9 and 10 of the Rivers and Harbors Act of March 3, 1899.

Appendix A on pages 25 and 26 of petitioner's brief sets out Sections 9 and 10 of the Rivers and Harbors Act of March 3, 1899, Ch. 425, 30 Stat. 1121, 1151 (33 U. S. C., Secs. 401, 403).

Apparently petitioner is of the view that the railroad embankments paralleling the Mississippi River and Walters Creek and the structures extending through and located upon such embankments are in violation of said Sections 9 and 10.

The material portion of Section 9 is as follows:

> "That it shall not be lawful to construct * * * any bridge, dam, dike or causeway over or in any * * * navigable river or other navigable water of the United States until the consent of Congress to the building of such structure shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War. * * *"

Respondents, of course, have not constructed their railroad embankments, telegraph lines, etc., in any navigable waterway of the United States.

The material portion of Section 10 relied upon by petitioner is as follows:

> "Section 10. That the creation of any *obstruction* not affirmatively authorized by Congress to the *navigable capacity* of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build * * * structures in any * * * navigable river, or other *water of the United States,* outside established harbor lines, or where no harbor lines have been estab-

> lished except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to * * * fill, or in any manner to alter or modify the course, location, condition or capacity * * * the *channel* of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same."

As previously pointed out, the railroad embankments and the structures in and on same do not constitute *obstructions* to the *navigable capacity* of the Mississippi River (see R. 135-137). The course, location, condition or capacity of the *channel* of the Mississippi River has not been changed by the embankments, etc., of the respondents.

The construction of the wing dams clearly indicated an intention on the part of the Government to maintain the navigable channel of the river at a point a long distance away from the railroad embankments (R. 179, 125, 121).

Major Riche, in 1909, definitely found there was nothing in the railroad plan of double tracks which was prejudicial to the interests of navigation (R. 151, 149). Apparently, Major Du Shane and Captain Thompson, engineers for the Government in 1909, also "thought there would be no objection whatever on the part of the Government" (R. 148) to the railroad's proposed double-tracking in 1910.

The navigable channel of the river between the ends of the wing dams, on opposite shores, was from 550 to 625 feet (Rd. Ex. 1, Appendix VI). House Document No. 290 shows the section of the river including the portion here involved to have an average width of 600 feet and a minimum width of 400 feet between the ends of the wing dams (Appendix V).

At the trial, counsel for the Government contended Section 9 and Section 10, referred to, relieved the Government

from the payment of compensation for the flooding of respondents' property. Counsel for the Government contended the railroad embankments were financial obstructions to navigation if the Government was required to pay compensation for the loss sustained (R. 135-137). In this regard, the Trial Court said:

> "Well, I can't see that. It has been the rule in all of the cases that the riparian owner can build down to low water mark, subject, of course, to the right of the Government to raise the waters, if your rule is right, to high water mark, and this would not interfere with the raising of it to high water mark. It only interferes with their raising it above high water mark" (R. 138).

In this connection, the Trial Court called attention to the fact that no damage would result to respondents by the mere raising of the water to ordinary high water mark (R. 138). In brief, the Government's claim was that while the railroad structures between low and ordinary high water mark did not interfere with or affect navigation, nevertheless, such structures were obstructions to such navigation if and only if the Government was compelled to compensate the riparian owner for such property.

We submit this is not the test as to the obligation of the Government or the rights of the respondents.

Respondents' embankments certainly were not constructed in the bed of the river. With reference to the bed of a river, the Century Dictionary and Encyclopedia states:

> "River bed—the channel in which a river flows."

The word channel is defined as follows:

> "(1) Channel—bed of a stream; hollow or course in which a stream flows. (2) the deeper part of a river

* * * where the current flows or which is most convenient for the track of a ship."

In *In Re Petition of Schaller*, 193 Minn. 604, 612, the Court indicates a difference exists in the meaning of the term "shore line" as applied to tidal waters and fresh water rivers. As to fresh water rivers, "shore line" is defined:

> "This term has usually been used to mean, in natural fresh water rivers, low water mark and grants bounded by the shore extend to that line, making the water's edge at low water the boundary."
>
> See also *Paine Lumber Co. vs. United States*, 55 Fed. 854, 864.

Cases Relied Upon by Petitioner Are Not in Point.

The misleading cross-section appearing as an appendix to the petitioner's brief gives the erroneous impression that the railroad embankments are located in the channel of the river.

In Wabasha County, the railroad in the claimed encroachment area is on the bank of the river as indicated in Appendix IV.

In Winona County, the railroad, in encroachment area I, is landward from but near the Minnesota bank of the river (Appendix I). Area II is about 1,400 feet from the channel of the river (Appendix II), and area III is about 2,000 feet from the channel of the river (Appendix III) (see also Appendix VI).

It should be kept in mind that the availability of the property of a riparian owner between low and ordinary high water marks on a tidal water is very different from the availability of land so located on a navigable inland river. On the Mississippi River, portions of the land between low and

ordinary high water elevations could at certain short periods of the year be made available for navigation of canoes, rowboats and duckboats if the willows, brush, trees and other vegetation were cleared from such area. Such areas, however, have no practical usability as a highway of interstate commerce, and the petitioner does not now propose to use such land for commerce or navigation. On the other hand, in tidal waters, as brought out in the *Willink* case, *infra* (cited on p. 31 of petitioner's brief), the low and ordinary high water levels are constantly changing by the tides and the area between said elevations is available for substantial commerce during some periods of each day. On tidal water, between low and ordinary high water, the action of the water is so frequent as to destroy all vegetation thereon and practically all use thereof except for boating, bathing, etc. On inland waterways, the areas between low and ordinary high water elevations contended for by the Government have vegetation, grasses and trees and the horizontal distance between the two elevations may be hundreds or even thousands of feet.

Respondents are of the same view as that expressed by the Circuit Court of Appeals (R. 197-198) that the Lynah and Cress cases are controlling in the instant case.

In the Lynah case, the land between low and ordinary high water marks was used as a rice plantation. In the instant case a portion of such land was used as the main line of a railroad and telegraph company. Other customary uses made of such lands are highways, summer cottages, hunting shacks, commercial fish ponds, firewood, grazing lands, etc. Large areas have been condemned by the United States for game refuges. Such bottom lands are particularly suitable to railroad tracks because of the usual gradual river gradients. This Court, in the Lynah case, considered and dis-

cussed three of the cases now relied upon by the Government, to-wit:

Scranton vs. Wheeler, 179 U. S. 141.
Gibson vs. U. S., 166 U. S. 269.
Mills vs. U. S., 46 Fed. 738.

Therefore, a further discussion of said cases would seem to be unnecessary.

The petitioner, apparently, is of the view that the Lynah case should be re-examined by this Court, asserting same to be inconsistent with such cases as:

Philadelphia Co. vs. Stimson, 223 U. S. 605.
Willink vs. U. S., 240 U. S. 572.
Greenleaf-Johnson Lbr. Co. vs. Garrison, 237 U. S. 251, 276.

The Lynah case has, of course, been cited by this Court in many decisions subsequent to the decisions in the cases just mentioned. For example, see:

Jacobs vs. U. S., 290 U. S. 13, 27.
U. S. vs. Cress, 243 U. S. 316, 326.
Hurley vs. Kincaid, 285 U. S. 95, 104.

The Circuit Court of Appeals (R. 196-197) brings out distinguishing features. Special attention is also called to the following in said opinion (R. 196):

> "It is interesting to note that in the Cress case, at pages 320-321 of 243 U. S., the Supreme Court cites *Greenleaf-Johnson Lumber Co. vs. Garrison, supra; Philadelphia Co. vs. Stimson, supra,* and *Willink vs. United States, supra,* in support of the general rule 'that private ownership of property in the beds and waters of navigable streams is subject to the exercise of the public

> right of navigation, and the Government control and regulation necessary to give effect to that right'; and then points out that 'it has become well established that the test of navigability in fact is to be applied to the stream in its natural condition, not as artificially raised by dams or similar structures'; that the public right is to be measured by the capacity of the stream for valuable public use in its natural condition; that riparian owners have a right to the enjoyment of the natural flow without burden or hindrance imposed by artificial means, and no public easement beyond the natural one can arise without grant or dedication save by condemnation with appropriate compensation for the private right."

The structures for which Willink claimed damages were within the harbor limits of a navigable tidal waterway. The structures were held to be obstructions to navigation. They were located at a point where the tidal water was navigable not only for smaller but also for larger vessels at high tide. The Government threatened to take the property, changed its plans and, in fact, did not take the property. The case did not involve damages caused by artificially raised water levels.

In *Greenleaf-Johnson Lbr. Co. vs. Garrison, supra,* in quoting from the Stimson case, *supra,* on page 262, this Court said:

> "It is for Congress to decide what shall or shall not be deemed in judgment of law an obstruction of navigation."

The Garrison case also involved structures in a navigable tidal water. The Government proposed to dredge the portion of the waterway where said structures were located. The structures were within the harbor lines and were actual

obstructions to navigation. The case did not involve the artificial raising of the water levels.

This Court, on page 262 of the Garrison case, distinguishes *Yates vs. City of Milwaukee, supra,* as follows:

> "* * * There was no proof in the record that the wharf involved was in fact an obstruction to navigation * * *"

There was no such proof in the instant case. On the contrary, the railroad embankments, as previously pointed out, have been aids to navigation.

In *United States vs. Chandler-Dunbar Water Pwr. Co., et al.,* 229 U. S. 53, 33 S. Ct. 667, 673, Congress by act had determined that the whole river between the American bank and the International line, etc., was necessary for the purposes of navigation. Attention is called to the fact that compensation was awarded under finding of fact No. 45 of the Trial Court in the case for parcels 95 and 96, same being filled in land used as a wharf on deep water.

On page 19 of petitioner's brief, it is suggested the Lynah case has been repudiated by *Jenkins vs. United States,* 60 Ct. Cls. 23. The Lynah case is cited with approval at page 27 of this case. The Jenkins case is to be distinguished. In that case, an alluvial elevation of the bed of the river known as a batture or sandbar was destroyed by reason of dredging the channel, and wasting materials nearby to protect the river banks. At a certain stage of the river, there would be 21 feet of water over the high point of the batture or sandbar in question. On page 27, the Court said:

> "Apparently it was assumed that the right existed to dredge the channel and if, in so doing, the batture was destroyed in the interest of deepening the river, the plaintiff would be without remedy" (p. 27).
>
> "If the right to dredge is conceded, it is difficult to

perceive just how the right to utilize dredge material, especially if it is to be used for the improvement of navigation, converts the transaction into a taking of private property. * * * It was not alone the deepening of the channel with which the Commission was concerned, but incidental thereto and as a part thereof was the necessity of preserving the banks intact, preventing erosion and maintaining natural conditions."

In *Jenkins vs. United States*, 273 U. S. 649, this Court sustained the decision of the Court of Claims in a per curiam decision, citing in support thereof five cases, all of which were brought under the Tucker Act. Two of said cases cite with approval both the Lynah and Cress cases.[11]

In *Marret, Adm., et al., vs. United States*, 82 Ct. Cls. 1, relied upon by petitioner, it appears plaintiff's pleasure resort located on the edge of the bank of the Ohio River was damaged by the raising of the waters of said river above Dam No. 41. The bank of the river at the point in question was steep, rising abruptly 20 feet above the sand beach, which gradually sloped therefrom into the river. On the river side, the building rested on a series of concrete piers. The resort continued to be used but a claim of $67,203.00 for loss of bathing beach, decreased market value, destruction of trees and loss of business was made. The Court said: "The proof as to these losses is not satisfactory." The Cress case is cited with approval. The Court of Claims held the damage was sustained in the bed of the river and same did not constitute a taking.

The Marret case involved structures located in a well-defined channel with a steep embankment extending down

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[11]Tempel vs. United States, 248 U. S. 121, 129.
United States vs. N. A. T. & T. Co., 253 U. S. 330.

into the river. In the instant case, in Wabasha County, the railroad embankment slopes down to the river but no structure is set on piers over a portion of the river. In Winona County, particularly areas II and III, there are very gradual slopes and a large body of land above ordinary high water mark intervening between the river and respondents' property, said land being covered by large, useful timber, grasses, etc.

This Court, without opinion, respectively denied a petition for writ of certiorari and a rehearing thereon:

A. M. Marret, Adm., et al., vs. United States, 299 U. S. 545.

A. M. Marret, Adm., et al., vs. United States, 299 U. S. 620.

A somewhat similar case is *Hood vs. United States,* 47 Ct. Cls. 669. In that case, plaintiff built a mill under State authority on the banks of the Monongahela River. "The original bank of the Monongahela River intersects the mill at a point nearer the land side of the mill than the water side * * * practically the whole side of the building projecting over the bank into the bed of the river" (p. 670). Most of the foundation of the building was resting in the water. The photographs contained in the opinion clearly distinguish the Hood case from the instant case.

The case of *Port of Seattle vs. Oregon & W. R. Co., et al.,* 255 U. S. 56, 41 S. Ct. 237, also relied upon by petitioner, is not in point. Among other reasons:

> "Under the law of Washington (which differs in this respect from the law generally prevailing elsewhere), a conveyance by the State of uplands abutting upon a natural navigable waterway grants no right of any kind, either in land below high water mark * * *" (p. 240).

If, under the State law, the riparian owner has no title to property below ordinary high water mark, a flooding of such property does not constitute a taking. In Minnesota, the riparian owner has fee title to low water mark.

In *United States vs. Meyer, et al.* (C. C. A. 7), 113 F. (2d) 387, relied upon by petitioner. On page 398, of said decision, it is stated:

> "It is insisted that the Court erred in instructing the jury that for damages caused by raising the water of the river *to the ordinary high water mark,* the Government was not liable. There is no taking from a riparian owner by the Government when water is raised *to the* ordinary high water mark for the purpose of *improving navigation;* * * *"

It is true some of the language used by the Court is broader than necessary for a determination of the case.

In the instant case, it should be kept in mind that in Winona County in the three claimed encroachment areas (Appendix I, II and III hereof), Dam No. 5 raised the water levels from 6.9 feet to 7.5 feet above ordinary high water elevation and in the claimed encroachment area in Wabasha County artificially raised the water levels 5.6 feet above ordinary high water elevation. It should also be kept in mind, in the instant case, the Government's attorneys conceded "that all of the damages sustained by the Railroad and Telegraph Companies are caused by the waters of the Mississippi River being raised to a level higher than ordinary high water mark" (R. 146).

In the Lynah case, as shown in the quotation on page 21 of petitioner's brief, this Court distinguishes the case of *Mills vs. United States,* 46 Fed. 738 (S. D. Ga.), apparently, on the ground that in the Lynah case the rice plantation was

totally destroyed whereas in the Mills case the rice plantation was not destroyed but it was necessary to provide new drainage and to raise the levees used to protect the rice fields at high water. In more recent years, the decisions make it clear property need not be totally destroyed in order to constitute a taking. A partial destruction or more frequent overflow is sufficient.[12] On pages 10, 13 and 14, petitioner cites and relies upon four opinions of the Attorney General, to-wit: 16 Op. A. G. 479 (1880); 16 Op. A. G. 534 (1880); 17 Op. A. G. 109 (1881); and 18 Op. A. G. 64 (1884).

It is significant that all four of the aforementioned opinions concerning the right of a riparian owner to recover for the destruction by the Government of property between low and ordinary high water marks were written 7 or more years prior to the decisions of this Court in the Lynah case (Feb. 23, 1903) and long before the decision in the Cress case (Mar. 12, 1917).

A brief summary of our view of some of the other cases relied upon by the Government may be helpful.

1. We do not claim the Government cannot deepen the channel of a navigable waterway.[13]

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[12]United States vs. Wabasha-Nelson Bridge Co. (C. C. A. 7), 83 F. (2d) 852.
United States vs. C., B. & Q. Rd. Co. (C. C. A. 8), 82 F. (2d) 131, 134.
United States vs. C., B. & Q. Rd. Co., 298 U. S. 689.
United States vs. C., B. & Q. Rd. Co. (C. C. A. 7), 90 F. (2d) 161.
United States vs. C., B. & Q. Rd. Co., 302 U. S. 714.
Jacobs vs. United States (C. C. A. 5), 45 F. (2d) 34.
Jacobs vs. United States, 290 U. S. 13.
United States vs. Cress, 243 U. S. 360.
Pumpelly vs. Green Bay & Miss. Canal Co., 13 Wall. 166, 20 U. S. S. Ct. 557, 561.

[13]Lewis Blue Point Oyster Co. vs. Briggs, 229 U. S. 82.
West Chicago Rd. vs. Chicago, 201 U. S. 506.
Jenkins vs. U. S., 60 Ct. Cls. 23.
Jenkins vs. U. S., 273 U. S. 649.

2. We do not claim the Government may not, in a proper case, improve and restrict the navigable channel and thereby take the waterway from the riparian owner in aid of navigation by cutting off his access to the river.

Gibson vs. United States, 166 U. S. 269.

3. We concede the burden is upon the land owner to prove the Government structures will in fact cause his property to be overflowed. Speculation and conjecture that such property may be damaged is not enough.

Sanguinetti vs. United States, 264 U. S. 146, 149.

4. We concede a land owner is not entitled to an injunction to enjoin the damming of a waterway, even though such land owner will be overflowed to a minor extent, and this is particularly true where a reasonable provision is made to pay lawful compensation.

Manigault vs. Springs, 199 U. S. 473, 487.

5. To recover, we concede there must be an actual invasion of claimant's land. A Government operation six miles upstream from claimant's land that did not involve invasion of any part of his land is not sufficient.

Bedford vs. United States, 192 U. S. 217, 225.

6. The United States is not responsible to riparian owners for consequential damages from the mere deflection of water by reason of structures lawfully constructed in aid of navigation.[14]

7. We do not deny that structures placed between low

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[14] Greenleaf-Johnson Lbr. Co. vs. Garrison, 237 U. S. 251, 263.
W. A. Ross Constr. Co. vs. Yearsley (C. C. A. 8), 103 F. (2d) 589, 592.
The case of W. A. Ross Construction Co. vs. Yearsley, supra, on page 592, distinguishes the Lynah and Cress cases.

and ordinary high water elevations on tidal waters where such area is in fact useful to actual navigation when the tide is in may be removed as an actual obstruction to navigation.[15]

8. We admit property owners cannot obstruct the channel of an inland navigable river in its natural state and if such property owner does so obstruct the channel, he owes the uncompensated duty to remove the obstruction, particularly where Congress has held the portion of the river where the obstruction exists is necessary for navigation.[16]

9. But we do claim the Government cannot by the construction of a dam, artificially raise the water levels and take the property of a riparian owner between low and ordinary high water marks or substantially impair the usefulness of such property whether same be a rice plantation, farm, a railroad or telegraph line without compensating the owner under the Fifth Amendment.

United States vs. Cress, 243 U. S. 316.
United States vs. Lynah, 188 U. S. 445.

10. We do claim the servitude of private lands to navigation is confined to the natural widths, levels and flows of the river. If more is taken, the Government must compensate the owner for such taking.[17]

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[15] **Willink vs. U. S.**, 240 U. S. 572.
Greenleaf-Johnson Lbr. Co. vs. Garrison, 237 U. S. 251.

[16] **United States vs. Chandler-Dunbar Co.**, 229 U. S. 53, 33 S. Ct. 667.
West Chgo. R. vs. Chicago, 201 U. S. 506.
Union Bridge Co. vs. U. S., 204 U. S. 364.

[17] **U. S. vs. C., B. & Q. Rd. Co.** (C. C. A. 8), 82 F. (2d) 131, 134, writ denied 298 U. S. 134.
U. S. vs. Cress, 243 U. S. 316, 332.
U. S. vs. Wabasha-Nelson Bridge Co. (C. C. A. 7), 83 F. (2d) 852, 854.
U. S. vs. Wheeler Township (C. C. A. 8), 66 F. (2d) 977, 984, and other cases cited.

11. We do claim where a riparian owner under local law has title to property beyond low water mark and such property does not obstruct or interfere with navigation, the Government cannot take such property without compensating the owner therefor.[18]

12. We do claim the riprapped railroad embankments from 1910 to 1934 were an aid to navigation in that same prevented a cutting away of the shore line. That the Government has had the benefit of such property in the transportation of the United States mail. That both the State and Federal Governments have received annually substantial sums of money in the form of taxes upon the railroad, including portions of same here involved and the doctrine of equitable estoppel is applicable as against the petitioner.[19]

The Court Properly Denied Motion of the United States, Made at the Close of the Testimony, to Dismiss From the Proceeding the Portion of the Property Claimed to Be an Encroachment in the Mississippi River.

(Assignment of Error No. 13.)

This assignment of error was abandoned by the Government's attorney on oral argument before the Circuit Court of Appeals but, inasmuch as the motion to dismiss is referred to on page 5 of petitioner's brief, it may be wise to briefly refer to this motion.

The motion was not made timely. The Government is the

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18 Yates vs. City of Milwaukee, 77 U. S. 497.
Monongahela Nav. Co. vs. U. S., 148 U. S. 312.

19 State vs. Carr (C. C. A. 8), 191 Fed. 257.
Monongahela Nav. Co. vs. U. S., 148 U. S. 312.
Walker vs. U. S., 139 Fed. 409, 413.

same as any other litigant when it brings an action.[20]

The Trial Court, in denying the motion to dismiss, stated rather fully his reasons for so doing (R. 154). It should be kept in mind that at the time this motion was made, hearing had been held before the Commissioners and award made to the respondents. Appeal had been taken to the District Court. Immediate possession of the property, including the four segments involved, had been ordered by the Court and taken by the petitioners. The water had been artificially raised against the embankment and through the railroad's bridges and culverts to the pool level. The Railroad and Telegraph Companies had taken measures to protect their property against the new artificial water levels and, in so doing, had expended large sums of money. The trial on the appeal had been completed so far as the taking of the testimony was concerned. During the trial, the petitioners had submitted to the Trial Court the question as to whether or not the respondents were entitled to recover compensation for the taking of their property in the four segments here involved. It was only after an adverse ruling had been made by the Trial Court that the Government decided and tried to dismiss the segments in question from the proceeding.

We submit the Government is the same as any other litigant before the Court and could not, after such adverse rulings and expenditures of money by the respondents, dismiss the property involved in this appeal from the proceeding.

See 20 *C. J.*, Section 458, at page 1082.

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[20] **Mountain Copper Co. vs. United States** (C. C. A. 9), 142 Fed. 625.
United States vs. Barber Lbr. Co. (C. C., Ida., C. D.), 169 Fed. 184, 187, 188.
United States vs. James Stinson, et al., 197 U. S. 200, 207.
The Steamer Siren and Cargo, etc., vs. United States, 74 U. S. 152, 165.

CONCLUSION

It is true the principles here involved are important to the Federal Government, to the Railroad, Telegraph and Telephone Companies whose lines are located on the bottom lands of the Mississippi River and many other inland streams, and also to state and local authorities maintaining roads and highways, as well as to the much larger group of riparian owners who use such bottom lands for grazing, hay, woodlots, rice cultivation, artificial fish ponds, piers, wharves and embankments to reach the navigable channel of such rivers.

As to the Judgment for Lands Taken in Winona County.

The Government's offer to prove the respondents' structures in 1910 were constructed between low and ordinary high water mark was immaterial as no offer was made to prove such condition existed in 1933 when condemnation proceedings were commenced or on August 4, 1934, when immediate possession was taken. The Government failed to prove Walters Creek adjacent to claimed encroachment areas II and III was a navigable waterway of the United States, although permitted so to do by stipulation of the parties (R. 145, 147).

As to the Judgment for Lands Taken in Both Winona and Wabasha Counties.

The respondents conceded their embankments in Wabasha County were between low and ordinary high water elevations of the river and if we assume (contrary to the fact) that the same situation existed in the claimed encroachment areas in Winona County, the offer of proof was immaterial

because it is, without dispute, shown that no portion of respondents' property or structures invaded the navigable channel of the river and did not obstruct or interfere with navigation therein (R. 135-138).

Under such circumstances, this Court has held riparian owners are entitled to compensation from the United States where the use of their property located between low and ordinary high water marks is destroyed or the use thereof substantially impaired.[21]

The servitude of respondents' property to navigation is confined to the natural widths, levels and flows of the river, whereas all of the damage here involved and the compensation awarded respondents therefor was due solely to the artificial raising of the Mississippi River water levels by the Government to a point in excess of ordinary high water mark.[22]

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[21] United States vs. Lynah, 188 U. S. 445.
Williams, et al., vs. United States, 104 Fed. 50.
United States vs. Williams, 188 U. S. 485.
King vs. United States, 59 Fed. 9.
United States vs. King, 164 U. S. 703.
Heyward vs. United States, 46 Ct. Cls. 484, 52 Ct. Cls. 87.
United States vs. Heyward, 250 U. S. 633.
Lowndes, et al., vs. United States, 105 Fed. 838.
United States vs. Wabasha-Nelson Bridge Co. (C. C. A. 7), 83 F. (2d) 852, 853.
Yates vs. City of Milwaukee, 77 U. S. 497.
Monongahela Navigation Co. vs. United States, 148 U. S. 312.
Jacobs vs. United States, 290 U. S. 13, 16.

[22] United States vs. Cress, 243 U. S. 316, 319.
Jacobs vs. United States, 290 U. S. 13, 16.
United States vs. C., B. & Q. Rd. Co. (C. C. A. 8), 82 F. (2d) 131, 134—Writ denied, United States vs. C., B. & Q. Rd. Co., 298 U. S. 689.
United States vs. Wabasha-Nelson Bridge Co. (C. C. A. 7), 83 F. (2d) 852, 854.
Weaver vs. Miss. & Rum River Boom Co., 28 Minn. 534, 538.
United States vs. Wheeler Township (C. C. A. 8), 66 F. (2d) 977, 984.

The Trial Court properly denied the motion of the United States made at the close of all the testimony to dismiss from these proceedings the property involved here. Such motion was not made timely.

We respectfully submit the Circuit Court of Appeals for the Eighth Circuit properly affirmed the judgments of the United States District Court, District of Minnesota, First Division, in the proceedings involving property of respondents in both Winona and Wabasha Counties.

F. W. Root,
A. C. Erdall,
C. O. Newcomb,
Attorneys for Respondents,
25 Milwaukee Station,
Minneapolis, Minnesota.

Of Counsel:
A. N. Whitlock,
C. S. Jefferson,
Chicago, Ill.

ILLUSTRATIVE CROSS-SECTIONS I, II, III AND IV

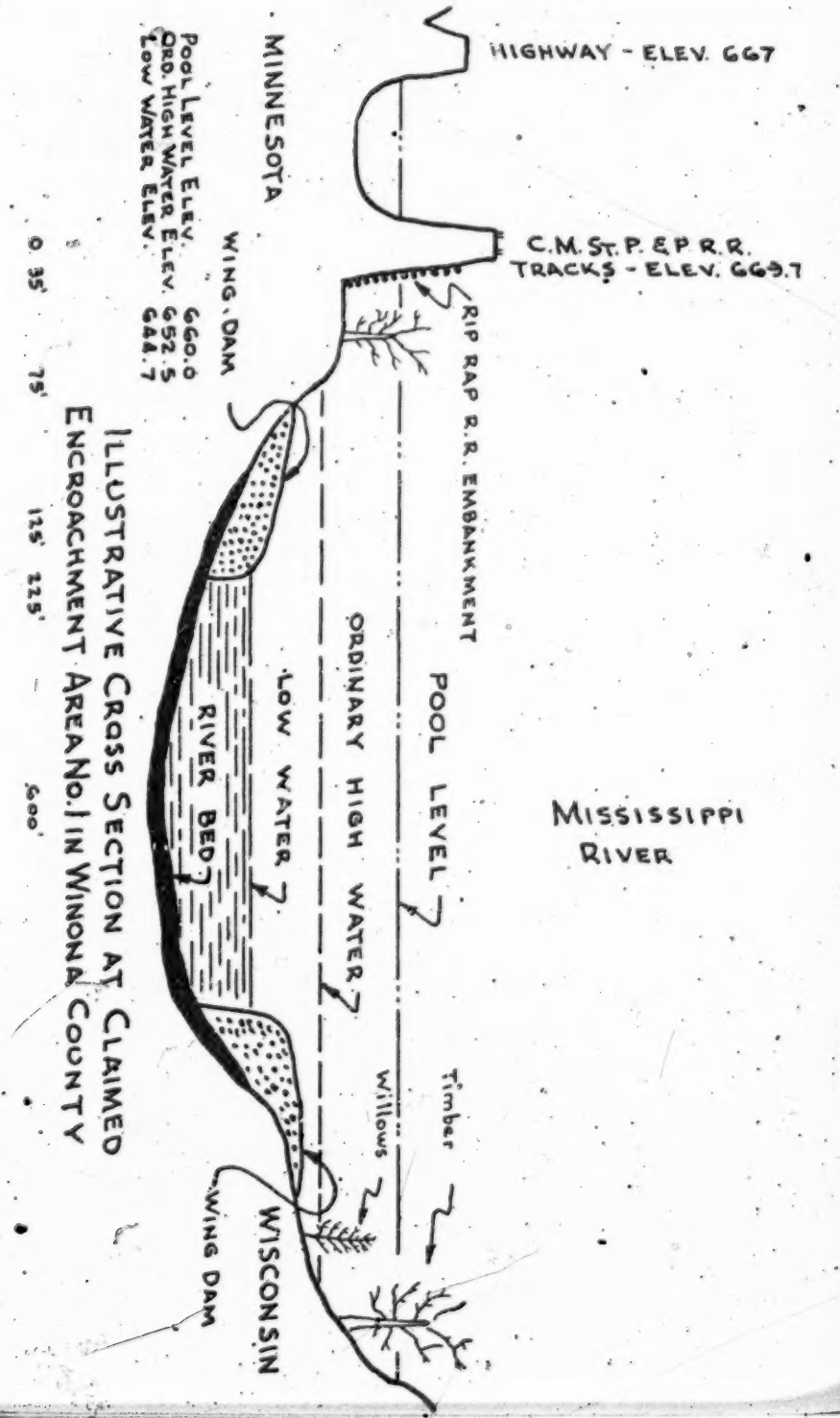
Appendix I—Claimed encroachment area I, Winona County, is adjacent to the Minnesota shore of the Mississippi River. The vertical distances have been exaggerated about ten times over horizontal distances so as to include all of the area on one page.

Appendices II, III—Respectively show claimed encroachment areas II and III in Winona County. The railroad in each of these areas is adjacent to Walters Creek. On each of the illustrations, the channel of the river is such a great distance from the railroad tracks that it was necessary to exaggerate the vertical distances over the horizontal distances respectively thirty and twenty-five times.

Appendix IV—Illustrates claimed encroachment area in Wabasha County in the Minneiska Station grounds. Here the railroad is also adjacent to the Minnesota shore of the Mississippi River. Vertical distances are exaggerated ten to twelve times over horizontal distances.

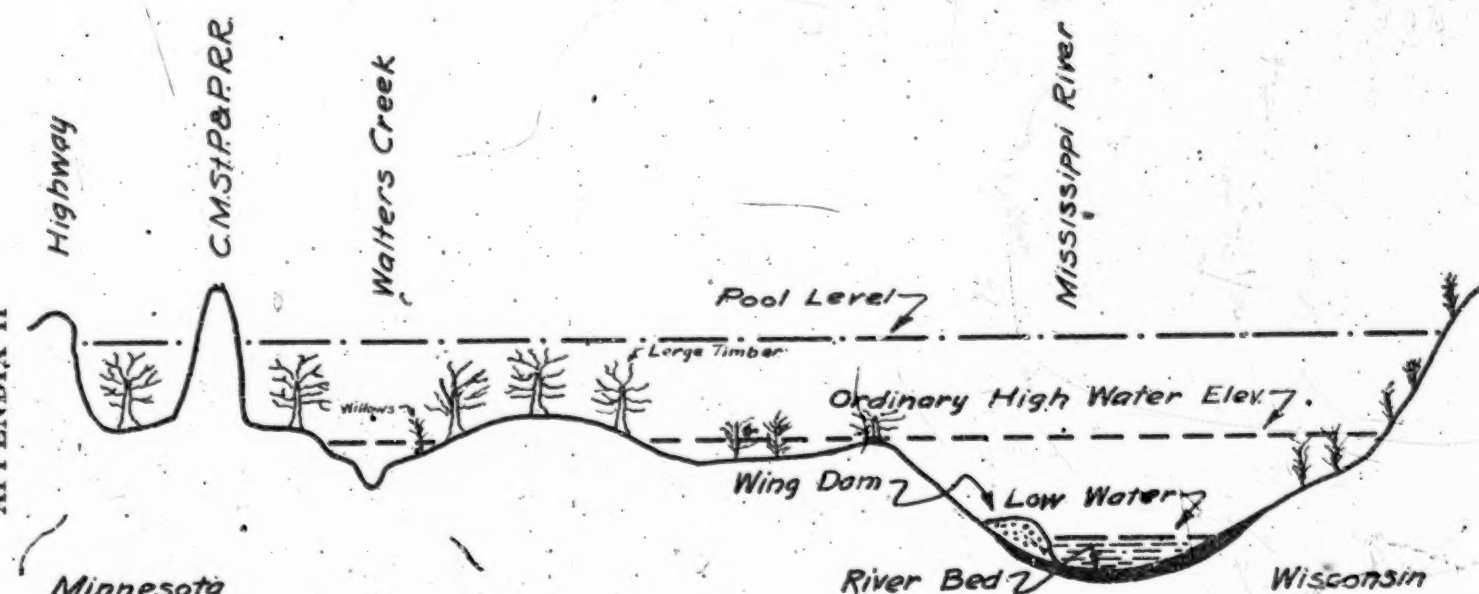
Each one of the four cross-sections shows the low and ordinary high water elevations in each area. The approximate distances the wing dams extend out from the railroad embankment, the river bed under the low water channel and the horizontal distance from the railroad tracks to ordinary high water mark, to the river end of the wing dam, to low water mark and to the center of the river are also shown. Each cross-section represents the average condition in each of the areas. They each show a representative wing dam, water surface at low water, at ordinary high water and at normal pool level of 660. Also, they show general location of large timber as well as general location of willows.

APPENDIX I



ILLUSTRATIVE CROSS SECTION AT CLAIMED ENCROACHMENT AREA No. 1 IN WINONA COUNTY

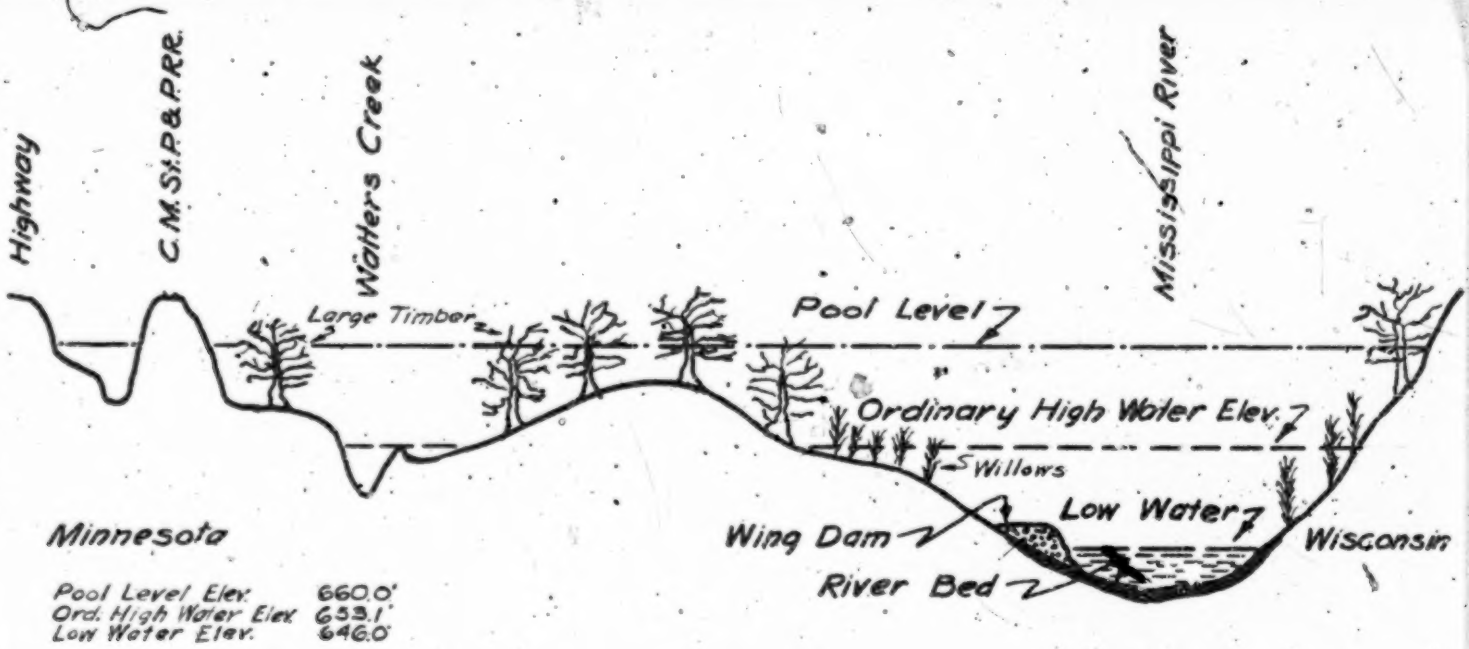
APPENDIX II



Pool Level Elev.	660.0
Ord. High Water Elev	652.9
Low Water Elev.	645.2

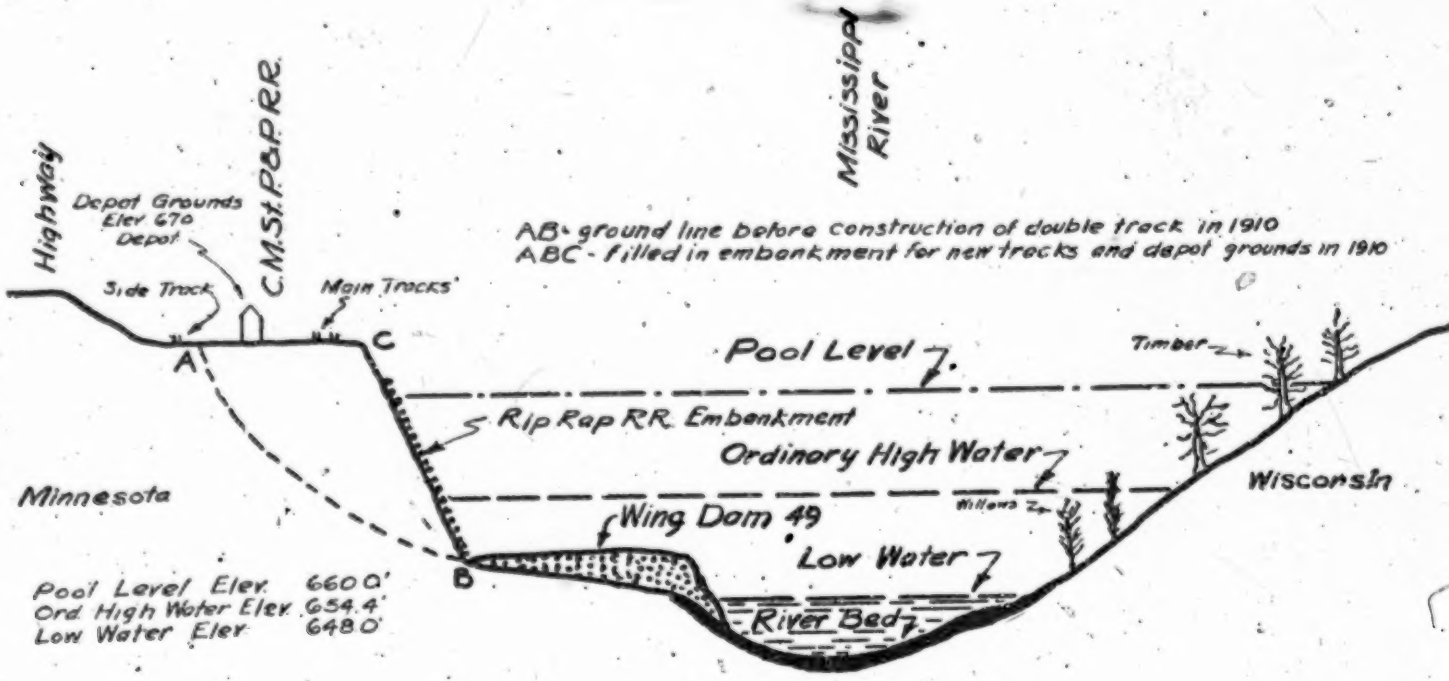
ILLUSTRATIVE CROSS SECTION AT CLAIMED ENCROACHMENT AREA No. II IN WINONA COUNTY

0 100' 700' 1400' 2100' 2400'



ILLUSTRATIVE CROSS SECTION AT CLAIMED ENCROACHMENT AREA No III IN WINONA COUNTY

0 200 1800 2000 2600



ILLUSTRATIVE CROSS SECTION AT CLAIMED ENCROACHMENT AREA IN WABASHA COUNTY

APPENDIX V

Excerpts from House Document No. 290, 71st Congress, 2nd Session:

"Letter from the Secretary of War Transmitting report from the chief of engineers on a partial survey of Mississippi River, between mouth of Missouri River and Minneapolis, with a view to securing a channel depth of 9 feet at low water, with suitable widths" (p. 1).

"The Board of Engineers for Rivers and Harbors,
Washington, D. C., January 22, 1930.

To the Chief of Engineers, United States Army:

1. The following is in review of the report on a partial survey authorized by the river and harbor act approved January 21, 1927, of the 'Mississippi River between Missouri River and Minneapolis, *with a view to securing a channel depth of 9 feet at low water, with suitable widths.*' A final report will be submitted after completion of the survey now in progress, which is expected to require about 12 months' additional time.

* * *

5. * * * Natural conditions are not particularly favorable to the construction of locks and dams. The valley is wide and flat, with numerous villages and small cities elevated not far above ordinary high water. *Railroad following the river are at many points just above high water,* and at the larger river cities, industrial developments line the stream closely. *It is considered therefore that in general low dams must be used, many of them built on pile foundations* on a sand, gravel and silt bed. High dams would require very long spillways with movable crests.

6. A plan is submitted by the special board, based upon the incomplete information now available. All of the works are adaptable to an ultimate 9-foot project.

Some are recommended for immediate construction to better conditions under the 6-foot project. *The balance form part of a comprehensive project for a channel 9 feet deep.* To assure a satisfactory 6-foot channel, it is stated that immediate dredging should be undertaken at the upper end of the Twin City Pool and for about 5 miles below the Twin City Dam. Reconstruction of the Twin City Lock, necessitated by failure of the lower gates and sill, is now under way. It is proposed to construct a parallel lock of the same dimensions (56 by 360), so as to provide 2-way traffic through this high-lift dam. Between the Hastings Dam and the mouth of the Wisconsin River, the construction of locks and dams is recommended. * * * It is stated that no project should be adopted which will make the erection of any specified type of dams mandatory before the accumulation of more complete data. *These dams would provide a 9-foot depth in the section of the river canalized.* * * *"*

"304. Lake Pepin to Genoa (86.5) miles.—(a) *This section of the river has an average width of 600 feet from ends of the wing dams to the opposite shore, and a minimum width of 400 feet.* * * *"*

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SUPREME COURT OF THE UNITED STATES.

No. 535.—October Term, 1940.

The United States of America, Petitioner, *vs.* The Chicago, Milwaukee, St. Paul and Pacific Railroad Company, et al.	On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[March 31, 1941.]

Mr. Justice Roberts delivered the opinion of the Court.

The question for decision is whether the United States must compensate a riparian owner for injury to structures located between high and low water marks, where the damage is caused by the raising of the water level in a navigable stream for the improvement of navigation. The importance of the question, and a conflict in the decisions of this court, led to the grant of certiorari.

The tracks of the respondent railroad and the pole lines of the respondent telegraph company in Wabasha and Winona counties, Minnesota, as relocated in 1910, are, in part, on an embankment on the westerly side of the Mississippi River. The embankment was adequately riprapped, where necessary, to protect it in times of high water.

In the prosecution of a project for the improvement of navigation the United States has been, and is, engaged in constructing a series of locks and dams in the upper reaches of the Mississippi. One of the dams authorized by Act of Congress[1] raises the level of the river and creates a pool which inundates bottom lands along the west bank.

In 1933 the Government instituted condemnation proceedings to acquire the right to back water across the respondents' right of way and against their embankment. Since the dam raises the water level from 5.6 to 7.5 feet above ordinary high water mark, the respondents were compelled at certain points to add additional riprap to prevent damage to their embankment.

[1] Rivers and Harbors Act of July 3, 1930, c. 847, 46 Stat. 918, 927.

At the trial in the condemnation proceeding the Government offered to prove that four segments of the embankment lie between the ordinary high and ordinary low water marks of the river; are, therefore, subject to the federal power to improve navigation; and that any injury to them by additional flooding is an incident of the exercise of the power and not the subject of compensation. The respondents objected to the offer as immaterial for the reason that neither before nor after the improvement did the embankment constitute an obstruction or menace to navigation and its maintenance was and is, therefore, a right of private property, the injury to which, in the prosecution of the federal project, entitled the owner to compensation.

The District Court rejected the offer of proof. Thereupon the Government moved to dismiss from the proceedings all question of compensation for the four encroachment areas where the embankment was claimed to be located between high and low water marks. The motion was denied. A verdict and judgment ensued for damages to the entire length of the embankment both where it was admitted to be located on fast land and where it was claimed to lie between high and low water marks. Each party appealed. Thereafter, by stipulation, all questions, except that touching the four segments of the embankment which the Government claimed were located between high and low water marks, were eliminated from the cause. It was stipulated by the respondents that one of the four segments in question was so located, but as to the other three the parties are in disagreement. The Court of Appeals, for the purpose of decision, assumed that all four were so located but held, nevertheless, that the Government was bound to compensate the respondents for damage to all of them, and affirmed the judgment of the District Court.[2]

Certain matters are not in dispute. The Mississippi River at the points in question is navigable. The respondent railroad is the riparian owner and, as such, its title extends to ordinary low water mark. The natural channel and the course of navigation through the pool formed by the dam lie at a considerable distance from the embankment which does not, and will not, obstruct or interfere with actual navigation. The lands lying between the embankment and the natural channel were low lands which, prior to the improvement, were to a great extent covered with trees and scrub.

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[2] 113 F. (2d) 919.

The respondents assert that the power of the Government to take private lands for the improvement of navigation is confined to the natural widths, levels, and flows of the river and that if more is taken compensation must be made. Their position is that the embankment can be injured without compensation only if it constitutes an encroachment and thus a hindrance or obstruction to actual navigation. The Government, on the other hand, insists that its power is not confined to the mere making or clearing of channels and removing hindrances and obstructions to their navigation, but embraces the exercise of every appropriate means for the improvement of navigable capacity and that, in the provision of any such means, it is entitled to deal with and alter the level of the stream to any extent up to ordinary high water mark without being answerable to riparian owners for injury to structures lying below that line.

Commerce, the regulation of which between the states is committed by the Constitution to Congress, includes navigation. "The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress."[3] And the determination of the necessity for a given improvement of navigable capacity, and the character and extent of it, is for Congress alone.[4] Whether, under local law, the title to the bed of the stream is retained by the State or the title of the riparian owner extends to the thread of the stream, or, as in this case, to low water mark,[5] the rights of the title holder are subordinate to the dominant power of the federal Government in respect of navigation.[6]

The power of Congress extends not only to keeping clear the channels of interstate navigation by the prohibition or removal of actual obstructions located by the riparian owner, or others, but comprehends as well the power to improve and enlarge their navigability.[7]

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[3] Gilman *v.* Philadelphia, 3 Wall. 713, 724.

[4] Scranton *v.* Wheeler, 179 U. S. 141, 162.

[5] Morrill *v.* St. Anthony Falls Water Pr. Co., 26 Minn. 222, 2 N. W. 842.

[6] Gibson *v.* United States, 166 U. S. 269, 271, 272.

[7] United States *v.* Chandler-Dunbar Co., 229 U. S. 53, 62; New Jersey *v.* Sargent, 269 U. S. 328, 337; United States *v.* Appalachian Electric Power Co., No. 12, October Term, 1940.

The bed of a river is "that portion of its soil which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn."[8]

The dominant power of the federal Government, as has been repeatedly held, extends to the entire bed of a stream, which includes the lands below ordinary high water mark. The exercise of the power within these limits is not an invasion of any private property right in such lands for which the United States must make compensation.[9] The damage sustained results not from a taking of the riparian owner's property in the stream bed, but from the lawful exercise of a power to which that property has always been subject.

The respondents admit that this is the settled rule but insist that it has been applied only in cases where the control of the Government was exercised to extend the area of practicable navigation either by constructing channels for actual use or by removing obstructions to navigation. They assert, and the court below was of opinion, that *United States* v. *Lynah*, 188 U. S. 445, and *United States* v. *Cress*, 243 U. S. 316, sanction a different principle where the improvement consists in the raising of the level of a stream to the injury of structures erected by the riparian owner between high and low water mark.

What was said in the *Cress* case must be confined to the facts there disclosed. In that case, the Government's improvement in a navigable stream resulted in the flooding of the plaintiffs' land in and adjacent to a non-navigable stream. The owners of the land along and under the bed of the stream were held entitled to compensation for the damage to their lands. The question here presented was not discussed in the opinion.

In the *Lynah* case the plaintiff's rice plantation was rendered worthless by the Government's raising the water in the Savannah River. Three questions were considered at length by this

[8] Alabama *v.* Georgia, 23 How. 505, 515.

[9] Scranton *v.* Wheeler, 179 U. S. 141, 143, 144; Greenleaf Lumber Co. *v.* Garrison, 237 U. S. 251, 263; Willink *v.* United States, 240 U. S. 572, 580; Delaware R. Co. *v.* Weeks, 293 Fed. 114, 120; Barr *v.* Spalding, 46 F. (2d) 798, 800; Marret *v.* United States, 82 Ct. Cls. 1, 13; United States *v.* Meyer, 113 F. (2d) 387, 398.

Court: Whether the trial court (the then Circuit Court) had jurisdiction; whether there was a taking of plaintiff's property; and whether the Government was bound to compensate therefor. All were answered in the affirmative. Applying earlier decisions it was held that the permanent flooding of land adjacent to a stream in the improvement of navigation, pursuant to statutory authority, amounted to a taking and that the court had jurisdiction to award compensation upon the footing of an implied contract of the Government to pay for what it took. But as the court below points out, the quoted findings show, and the opinion adverted to the fact, that the plantation lay, in part, between the high and low water lines, and this Court held that the flooding constituted a taking of the whole for which compensation was due under the Fifth Amendment to the Constitution. Moreover, three justices based their dissent largely on the fact that compensation was awarded for injury to lands lying below high water mark. We are bound, therefore, to determine whether we shall follow that decision in respect of the issue involved in the instant case. The decision was by a divided court and later, in a similar case, there was an affirmance by an equally divided court.[10] The case has often been cited as authority for the settled doctrine that an authorized taking of property for public use gives rise to an implied promise to pay just compensation. But we think this Court has never followed it as a binding decision that compensation is due for injury or destruction of a riparian owner's property located in the bed of a navigable stream. And we think that, so far as it sanctions such a principle, it is in irreconcilable conflict with our later decisions[11] and cannot be considered as expressing the law.

It is not true, as respondents maintain, that only structures in the bed of a navigable stream which obstruct or adversely affect navigation may be injured or destroyed without compensation by a federal improvement of navigable capacity. On the contrary, any structure is placed in the bed of a stream at the risk that it may be so injured or destroyed; and the right to compensation does not depend on the absence of physical interference with navigation. The *ratio decidendi* and the circumstances disclosed in numerous cases lead inevitably to this conclusion.[12]

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[10] United States *v.* Heyward, 250 U. S. 633.

[11] See cases cited in Note 9 *supra.*

[12] See the cases cited in Note 9, and United States *v.* Chandler-Dunbar Co., 229 U. S. 53, 70; Lewis Blue Point Oyster Co. *v.* Briggs, 229 U. S. 82, 86-88.

The respondents claim that two of the sections of embankment in question abut, not on the Mississippi River, but on a non-navigable tributary and that another, though along the bank of the river, is at or above the ordinary high water line. The Government disagrees. These issues of fact remain for solution by the District Court.

The judgment is reversed and the cause is remanded to the District Court for further proceedings in conformity with this opinion.

So ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

not only are above ordinary high water mark but also claim that they